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Nos. 80-1012, 80-1030 and 80-1052

IN THE

Supreme Court of the United States

October Term, 1981

WINE & SPIRITS WHOLESALERS OF CALIFORNIA, a California corporation,

Petitioner,

vs.

NORMAN WILLIAMS COMPANY, etc., *et al.*,

Respondents.

On Writ of Certiorari to the Court of Appeal of the State of California Third Appellate District.

REPLY BRIEF OF PETITIONER WINE & SPIRITS WHOLESALERS OF CALIFORNIA IN CASE NO. 80-1052.

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Introduction.

In this Reply Brief, we discuss only matters raised in Respondents' Brief which were not addressed in the opening brief of Petitioner Wine & Spirits Wholesalers of California.

Preliminarily, we make four observations concerning Respondents' Brief:

1. Although in proceedings before the California Court of Appeal Respondents limited their challenge to the Designation Statute to the validity of the Statute *on its face*, they nevertheless made there (and repeat to this Court) numerous factual assertions, many of which were specifically controverted or were unsupported by competent evidence, or both. (*See e.g.*, Respondents' Brief at 2, 4, 5, 6, 20, 23.) The California Court of Appeal made no findings of

fact and specifically stated that it did not rely upon the largely irrelevant exhibits filed by Respondents in alleged support of their petition. *Norman Williams Company, et al. v. Baxter Rice,* 108 Cal. App. 3d 348, 352 (1980). Instead, the California court held that the Designation Statute, *adjudged on its face,* constitutes a *per se* violation of the Sherman Act and does not fall within either the state action exemption from the Act or the legislative jurisdiction of California under the Twenty-first Amendment. The issue before this Court is whether those lower court determinations were correct, without regard to the unsupported factual assertions made in Respondents' Brief.

2. Many of the arguments addressed by Respondents to this Court have no relevance to the issues at bench and are more appropriately addressed to the California Legislature. For example, Respondents assert that "the state . . . is certainly indifferent as a regulator to promoting new brands or old sluggish brands. . . ." (Respondents' Brief at 21.) Such matters were within the legislative jurisdiction of the California Legislature to resolve when A.B. 499 (the bill which amended the Designation Statute in 1979) was under consideration[1] and are open for reconsideration by the Legislature at any time.

3. Respondents' repeated assertion that "the California courts" have determined that the Designation Statute "serves no legitimate regulatory goal related to liquor" (Respondents' Brief at 8, 24) is inaccurate in two respects.

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[1]Arguments of this kind doubtless were made to the Legislature when A.B. 499 was under consideration. The bill was opposed at various stages by Respondent Norman-Williams, Inc., Amicus Curiae Consumers Union and others. (J.A. 57, 63, 72; Consumers Union Brief at 3.) The California Senate vote on A.B. 499 was 21 in favor and 8 opposed, and the California Assembly vote on the bill was 49 in favor and 15 opposed. (J.A. 71.)

First, only *one* California court—the court below—has construed the Designation Statute. *Second*, the Court of Appeal chose to ignore entirely one of the most important state interests served by the Designation Statute: support of the business judgment of those distillers and brand owners who choose to adopt California marketing plans for their products based on vertical allocation of the wholesale market. The business justification for these marketing decisions and their beneficial effect on interbrand competition were recognized by this Court in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) ("*GTE Sylvania*"), and are compellingly demonstrated in the Briefs of Bohemian Distributing Company (at 11-15) and Amicus Curiae on behalf of Wine & Spirits Wholesalers of America, Inc. and National Beer Wholesalers Association of America, Inc. (at 5-10).

4. Respondents' several assertions that the Designation Statute grants or delegates to private parties "unlimited power" to "prohibit" trade among other private parties or to "exclude them from the market" (*e.g.*, Respondents' Brief at 7, 8, 10, 14, 15, 19, 31, 35) are wide of the mark. The Designation Statute does not empower distillers or brand owners to select a limited number of wholesalers to handle their products; the distillers and brand owners were free to do that before the Designation Statute was enacted. All that the Designation Statute does—*and does through state action, not private action*—is prevent third parties from interfering with a brand owner's selection of the wholesale distributors for his product in California.

ARGUMENT.

A. RESPONDENTS HAVE FAILED TO DEMONSTRATE THAT THE DESIGNATION STATUTE VIOLATES THE SHERMAN ACT.

1. The Designation Statute Does Not Violate the Sherman Act Because It Does Not Require or Authorize Contracts, Combinations or Conspiracies in Restraint of Trade.

Amicus Curiae Heublein, Inc. perceptively identifies a fundamental flaw in the California Court of Appeal's antitrust analysis; *i.e.*, failure to recognize that the Designation Statute does not violate the Sherman Act because it neither requires nor authorizes private parties to contract, combine or conspire in restraint of trade. (Heublein Brief at 4-7.)

By its express terms, Section 1 of the Sherman Act proscribes only a "contract, combination . . ., or conspiracy in restraint of trade or commerce." 15 U.S.C. § 1. Accordingly, proof of a contract, combination or conspiracy is *essential* to the establishment of a violation of the statute. *Weir v. Chicago Plastering Institute*, 272 F.2d 883, 887 (7th Cir. 1959). *Compare Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 540-41 (1954). *See also* 16A *Business Organizations*, Von Kalinowski, *Antitrust Laws and Trade Regulation* § 6.01[1], [2], [3] at 6-2 - 6-54 (1981), and cases cited therein.

None of the cases cited by Respondents—all of which involve state-sanctioned private *price-fixing* arrangements —purport to dispense with the requirement of a contract,

combination or conspiracy. (Respondents' Brief at 10-11.)[2] The issue was not presented by the parties, much less decided by this Court in *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) ("*Midcal*").[3] Since *Midcal*, two decisions have expressly reaffirmed that a state statute which neither requires nor authorizes private contracts, combinations or conspiracies in restraint of trade does not contravene the Sherman Act. *See Morgan v. Division of Liquor Control*, 664 F.2d 353, 355 (2d Cir. 1981); *United States Brewers Ass'n., Inc. v. Healy*, 1982-1 Trade Cases ¶ 64,550 at 73,012 (D.Conn. 1982).

In attempted response to Amicus Curiae Heublein, Respondents contend that what they term a brand owner's designation agreement[4] "*should be deemed* to supply the element of 'a combination' or 'contract'. . . ." (Respondents' Brief at 11 (emphasis added).) However, Respondents also state that "it is the distiller's refusal to designate which causes the exclusion [of nondesignated importers] rather than the distiller's designation agreements. . . ." (*Id.*)

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[2]Respondents argue that the contract, combination or conspiracy element of a Sherman Act violation is "deemed to exist in a tying violation . . ." and therefore should be deemed to exist in the case of the Designation Statute. (Respondents' Brief at 11.) They are wrong. "To establish a tying arrangement violative of § 1 of the Sherman Act . . . the plaintiff *must first prove an agreement or understanding between the seller and the buyer* conditioning the seller's sale of one product upon the buyer's purchase of another." *Sargent-Welch Scientific Co. v. Ventron Corp.*, 567 F.2d 701, 708 (7th Cir. 1978), *cert. denied*, 439 U.S. 822 (1978) (emphasis added). The existence of the requisite agreement is a question of fact. 567 F.2d at 709.

[3]The California statute at issue in *Midcal* provided for fixing of resale prices by contract as well as through posting of prices by wine producers.

[4]Respondents' frequent reference to "designation agreements" is erroneous. The Designation Statute does not speak in terms of "agreements" but of unilateral action by distillers, and no such agreements are shown in the record.

Respondents alternatively argue that "the element of combination required in Sherman Act § 1 *may be deemed to exist* in the present case by virtue of the State's cooperation in enforcing the exclusions made by the distillers." (Respondents' Brief at 11-12 n.4 (emphasis added).) The holding in *Parker v. Brown*, 317 U.S. 341 (1943), the case relied upon by Respondents, is *directly* to the contrary: a state makes "no agreement and enter[s] into no conspiracy in restraint of trade" merely by adopting and enforcing a regulatory program, "but, as sovereign, impose[s] the restraint as an act of government which the Sherman Act did not undertake to prohibit." 317 U.S. at 352.

Because the Designation Statute neither compels nor authorizes private parties to contract, combine or conspire in restraint of trade, the Statute does not violate the Sherman Act. Furthermore, as we have pointed out in our opening brief, the Statute is also valid under the Sherman Act pursuant to the principles applied in *GTE Sylvania*.

2. The Designation Statute Does Not Sanction Group Boycotts in Violation of the Sherman Act.

In an effort to fit the Designation Statute within the confines of a purported *per se* violation of the Sherman Act, Respondents seize upon a series of cases dealing with concerted refusals to deal with other traders (referred to herein as "group boycotts") and assert that the so-called "exclusionary practice" authorized by the Designation Statute is "analogous" to the practices held illegal in those cases. (Respondents' Brief at 13-14.) The purported analogy is untenable. The Designation Statute contemplates *unilateral* action by distillers; it neither requires nor authorizes the type of collaborative conduct that constitutes a group boycott. Moreover, Respondents have confused group boycotts, which in certain contexts are *per se* illegal, with purely

vertical marketing arrangements, which are subject to the rule of reason.[5]

Vertical marketing arrangements unilaterally initiated and arranged by a producer of goods are distinguishable from group boycotts in both purpose and effect. "[T]he hallmark of the 'group boycott' is the effort of competitors to 'barricade themselves from competition *at their own level*'." *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1178 (D.C. Cir. 1978) (citation omitted) (emphasis added); *accord, Phil Tolkan Datsun, Inc. v. The Greater Milwaukee Datsun Dealers Advertising Ass'n., Inc.*, 1982-1 Trade Cases ¶ 64,579 at 73,180 (7th Cir. 1982). Those group boycotts which have been held to violate the Sherman Act manifestly served no purpose other than to eliminate competition. *See Larry V. Muko, Inc. v. Southwestern Penn. Bldg. & Const. Trades Council*, 1982-1 Trade Cases ¶ 64,505 at 72,794 - 72,796 (3d Cir. 1982); *Smith v. Pro Football, Inc., supra*, 593 F.2d at 1178-81, and cases cited therein. In contrast, vertical marketing arrangements are promotive of interbrand competition. (*See GTE Sylvania* and discussion in the Briefs of Petitioner Bohemian Distributing Company (at 11-15) and Amicus Curiae on behalf of Wine & Spirits Wholesalers of America and National Beer Wholesalers Association of America, Inc. (at 5-10).) Furthermore, there is no evidence that either distillers or designated wholesalers have com-

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[5]Not all types of group boycotts are *per se* illegal. *See Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc.*, 637 F.2d 1376, 1383 (9th Cir.), *cert. denied*, 102 S.Ct. 128 (1981); *United States Trotting Ass'n. v. Chicago Downs Ass'n., Inc.*, 665 F.2d 781, 788 (7th Cir. 1981) (*en banc*); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1365-69 (5th Cir. 1980). It is unnecessary for the Court to decide in the present case the parameters of the *per se* rule in the context of group boycotts since the Designation Statute does not compel or authorize a group boycott and none is shown in the record.

bined to exclude non-designated wholesalers from the California wholesale market.

The three group boycott cases relied upon by Respondents clearly have no bearing on the present case. In *Associated Press v. United States*, 326 U.S. 1 (1945), the Court concluded that the by-laws of Associated Press, an association of more than 1200 newspapers, were unreasonable insofar as they gave each member the power to prevent its non-member competitors from joining the association. 326 U.S. at 14-19. The *Associated Press* case involved a purely horizontal combination of competitors. Nothing in the Designation Statute gives one wholesaler the right to exclude another from a source of supply.

In *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207 (1959), also relied upon by Respondents, Broadway-Hale, a major department store chain, induced ten national manufacturers of household appliances and their distributors to refuse to sell to a competitor department store or to sell to it only at discriminatory prices and on highly unfavorable terms. The case is wholly distinguishable because that restraint involved concerted anticompetitive action at the manufacturer, wholesaler and retailer levels and was initiated by a retailer for the purpose of eliminating a competitor. In holding that the combination constituted an illegal group boycott, the Court emphasized that it was not faced with "the case of a single trader refusing to deal with another, or even of a manufacturer and a dealer agreeing to an exclusive dealership. Alleged in [the Klor's] complaint is a wide combination consisting of manufacturers, distributors and a retailer." 359 U.S. at 212.

United States v. General Motors Corp., 384 U.S. 127 (1966), is equally inapposite. As in *Klor's*, the manufacturer did not make an independent marketing decision designed to improve its competitive position. Instead, it par-

ticipated in a conspiracy initiated by dealers to eliminate *their* competition. The Court condemned the conspiracy as one involving elimination of competitors by "joint collaborative action." 384 U.S. at 145.

In *GTE Sylvania*, the Court distinguished vertical marketing arrangements from the type of practices proscribed in the *General Motors* case:

> There may be occasional problems in differentiating vertical restrictions from *horizontal restrictions originating in agreements among the retailers*. There is no doubt that restrictions in the latter category would be illegal *per se*, see, e.g., *United States v. General Motors Corp.*, . . . but we do not regard the problems of proof as sufficiently great to justify a *per se* rule.

433 U.S. at 58 n.28 (emphasis added).

A number of cases decided since *GTE Sylvania* have emphasized the distinction between purely vertical marketing arrangements and situations in which one or more dealers enlist the aid of a common supplier in a conspiracy to cut off supplies to the dealers' competitors. The critical distinction between the two types of cases is clearly articulated in *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 168 (3d Cir. 1979):

> When a manufacturer acts on its own, in pursuing its own market strategy, it is seeking to compete with other manufacturers by imposing what may be defended as reasonable vertical restraints. This would appear to be the rationale of the *GTE Sylvania* decision. However, if the action of a manufacturer or other supplier is taken at the direction of its customer, the restraint becomes primarily horizontal in nature in that one customer is seeking to suppress its competition by utilizing the power of a common supplier. Therefore, although the termination in such a situation is, itself,

a vertical restraint, the desired impact is horizontal and on the dealer, not the manufacturer, level.

Accord, Battle v. The Lubrizol Corp., 1982-1 Trade Cases ¶ 64,576 at 73,156 (8th Cir. 1982); *Com-Tel, Inc. v. Dukane Corp.*, 1982-1 Trade Cases ¶ 64,504 at 72,785 (6th Cir. 1982); *Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc., supra,* 637 F.2d at 1385; *Blankenship v. Herzfeld,* 661 F.2d 840, 844 (10th Cir. 1981); *Donald B. Rice Tire Co. v. Michelin Tire Corp.*, 638 F.2d 15, 16 (4th Cir.), *cert. denied,* 102 S. Ct. 324 (1981).

Clearly, the Designation Statute does not authorize group boycotts or conduct analogous to group boycotts.

3. It Is Immaterial That the Designation Statute Precludes Purchases by Nondesignated Importers Rather Than Sales to Such Importers by Out-of-State Wholesalers.

Respondents concede that under *GTE Sylvania,* the rule of reason "may well allow a distiller to prohibit his own franchisee from reselling his brand to a third party in another state." (Respondents' Brief at 17 (emphasis deleted).) They contend, however, that when the distiller has not restricted resale of products sold to a distributor, the distiller may not "reassert control" over such products by precluding third parties from acquiring them. They also assert that a distiller's sole method of achieving vertical allocation is to bind his out-of-state distributors, contractually, not to sell to California wholesalers and enforce that restriction by refusing to sell to a distributor who breaches his contract. (*Id.* at 17-18.) Both contentions are wrong.

The first contention is wrong because a distiller who declines to designate a California importer to carry his brand does not thereby "reassert control" over products sold to an Oklahoma (or other) wholesaler. Indeed, the distiller does not act at all; it is the Designation Statute that prohibits

importation by a non-designated wholesaler. Respondents' second contention is wrong because when an Oklahoma or other wholesaler may be contractually prohibited from reselling to nondesignated California importers, consistently with *GTE Sylvania*, the antitrust laws do not rigidly limit the means of enforcing the restriction to termination of a wholesaler who breaches the contract.[6] *GTE Sylvania* expressly declined to hold that the applicability of the rule of reason would turn on the degree or form of the restriction imposed.[7] *GTE Sylvania*, 433 U.S. at 58 n.29.

B. ARTICLE XX, SECTION 22 OF THE CALIFORNIA CONSTITUTION IS IRRELEVANT TO THE ISSUES IN THIS CASE.

Respondents state that "California Constitution, Article XX, Section 22, . . . expressly acknowledges that the state's power to regulate importation of liquor into California is 'subject to the laws of the United States' enacted under the Commerce Clause." (Respondents' Brief at 29.) The meaning of Respondents' statement is unclear to Petitioner. How-

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[6]Nor is it true, as implicitly asserted by Respondents, that a brand owner has no remedy against a nondesignated California wholesaler who acquires the brand owner's products in violation of an agreement between the brand owner and his franchisee. (*See* Respondents' Brief at 15-16.) The courts have long recognized that injunctive relief will lie against a third party for inducing breach of a lawful contract. *See, e.g., Bitterman v. Louisville & Nashville Rd. Co.*, 207 U.S. 205, 222-23 (1907); *Engine Specialties v. Bombardier, Ltd.*, 330 F.Supp. 762, 768 (D. Mass. 1971), *aff'd.*, 454 F.2d 527 (1st Cir. 1972); 43A C.J.S. *Injunctions* § 105 (1978).

[7]Respondents incorrectly cite *Adolph Coors Co. v. A & S Wholesalers*, 561 F.2d 807 (10th Cir. 1977), as holding that an injunction which prohibited a non-franchisee from transporting Coors beer in violation of the brewer's territorial restrictions was wrongful. In fact, the injunction in question was dissolved *by the trial court* in reliance on *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967). After *Schwinn* was overruled in *GTE Sylvania*, the Court of Appeals remanded to the District Court, for reconsideration in light of *GTE Sylvania*, the issue whether Coors was liable for procuring an allegedly wrongful injunction. 561 F.2d at 814.

ever, Respondents are obviously wrong if they mean to assert that by reason of this provision of the California Constitution, the laws of the United States applicable to intoxicating liquor, including the Sherman Act, are to be given a wider scope and effect in California than those laws would otherwise have.

Article XX, Section 22, of the California Constitution ("Section 22") was enacted by an initiative measure adopted by the people of California in anticipation of the repeal of the Eighteenth Amendment. Its first paragraph provides in relevant part:

> The State of California, subject to the internal revenue laws of the United States, shall have the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of alcoholic beverages within the State, and subject to the laws of the United States regulating commerce between foreign nations and among the states shall have the exclusive right and power to regulate the importation into and exportation from this State, of alcoholic beverages. . . .

The primary purpose of Section 22 was to allocate to the state government of California the sole power to regulate alcoholic beverages, which otherwise would have been subject to regulation in part by chartered cities pursuant to Article XI, Section 6 of the California Constitution. *See Sandelin v. Collins*, 1 Cal. 2d 147, 151-53, 33 P.2d 1009 (1934); *cf. Ainsworth v. Bryant*, 34 Cal. 2d 465, 211 P.2d 564 (1949); *Compare Los Angeles Brewing Co. v. City of Los Angeles*, 8 Cal. App. 2d 379, 390, 48 P.2d 65 (1935), *with Los Angeles Brewing Co. v. City of Los Angeles*, 8 Cal. App. 2d 391, 397, 48 P.2d 71 (1935). To express the intention that, within California, the state government alone is to have broad regulatory powers with respect to alcoholic

beverages, the drafters of Section 22 provided that the State "shall have the *exclusive right and power*" to license and regulate the manufacture, sale, purchase, possession and transportation of intoxicating liquors within the State and to regulate the importation into and exportation from the State of intoxicating liquor. (emphasis added.) Then, to make it clear that California was not, by this language, purporting to arrogate to itself the right and power to regulate intoxicating liquors *to the extent that they would be subject to regulation by the federal government to the exclusion of the several States after repeal of the Eighteenth Amendment*, the drafters included the following two phrases: (1) "subject to the internal revenue laws of the United States" and (2) "subject to the laws of the United States regulating commerce between foreign nations and among the states."

There is nothing to indicate that the drafters of Section 22—or the people of California in adopting that provision of the California Constitution—intended by the second "subject to" clause to yield to federal law any scope that it would not otherwise have had within our federal system after the adoption of the Twenty-first Amendment. The decisions of the California Courts confirm that California has the same broad authority as other States over intoxicating liquor. *Allied Properties v. Dept. of Alcoholic Beverage Control*, 54 Cal. 2d 141, 147, 346 P.2d 737 (1959) ("A state has particularly wide powers with respect to the manufacture of and traffic in alcoholic beverages. . . . The same broad powers are recognized in section 22 of article XX of the California Constitution."); *accord, Sandelin v. Collins, supra*, 1 Cal. 2d at 153.

It follows, therefore, that Section 22 has no bearing on the issues before this Court.

C. THE FEDERAL ALCOHOL ADMINISTRATION ACT DOES NOT PREEMPT THE DESIGNATION STATUTE.

Respondents contend that the Designation Statute is preempted by Section 5 of the Federal Alcohol Administration Act (27 U.S.C. § 205) ("Section 5") "because [the Statute] indirectly gives the distiller the power to prevent interstate transactions so as to require that retailers purchase its brand of distilled spirits only from designated wholesalers to the exclusion of like distilled spirits offered by non-designated wholesalers." (Respondents' Brief at 34.)

Respondents misread the federal statute. Section 5 makes it unlawful, *inter alia*, "for any person engaged in business as a distiller . . . of distilled spirits . . . to require . . . that any *retailer* . . . purchase any such products *from such person* to the exclusion . . . of distilled spirits . . . sold or offered for sale *by other persons* in interstate or foreign commerce, if [certain conditions are met]. . . ." (emphasis added.) The statute does not apply to this case for two reasons:

1. Section 5 only precludes a distiller from requiring that a *retailer* purchase from the *distiller* ("such person") to the exclusion of others.[8] Under California's three-tier distribution system, out-of-state distillers may not sell to retailers; hence, a distiller would never have occasion to require a retailer to purchase the distiller's products from him to the exclusion of others.

2. Section 5 applies only in a situation where a retailer is required by a distiller to purchase his product to the exclusion of the product *of another distiller* ("distilled spir-

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[8]The legislative history of Section 5 confirms that the statute is intended only to preclude "exclusive purchase arrangements with retailers" so as to prevent "monopolistic control" over them. H.R. Report No. 1542, 74th Cong., 1st Sess. 11; Sen. Report No. 1215, 74th Cong., 1st Sess. 6-7.

its sold . . . by other persons''); the statute has no application to a situation where a retailer is required to purchase *the distiller's own product* from the distiller himself (in a state where such purchases are permitted) rather than from another source.

In effect, Respondents would have the Court construe Section 5 as though it not only applied to purchasers at the wholesale level but also required *all* distillers to sell to *all* wholesalers. This construction, if adopted, would impose a federal, Oklahoma-style ''open wholesaling law'' upon every state. No one has heretofore suggested that Section 5 is intended thus to intrude on the several States' right to determine the structure of their liquor distribution systems.

D. THE DESIGNATION STATUTE DOES NOT DENY NON-DESIGNATED WHOLESALERS DUE PROCESS OF LAW.

Building on their mistaken notion that the Designation Statute grants or delegates to distillers the ''power'' to ''exclude their competitors'' (Respondents' Brief at 35), Respondents contend that the Statute ''superimposes a second tier of private licensing over the state's licensing process . . . [and] should be subject to the same due process requirements otherwise applicable to the granting or revocation of liquor licenses.'' (*Id.* at 36.) Starting with a false premise, Respondents have reached an equally erroneous conclusion.

When California licenses a person or business entity to import liquor and distribute it at the wholesale level, the State does not guarantee that any distiller will elect to use the licensee's services to distribute the distiller's products—any more than the State guarantees clients to licensed lawyers, patients to licensed doctors, or patrons to licensed retail liquor stores. The license merely *authorizes* the licensee to import and distribute alcoholic beverages. Whether

a particular distiller selects a particular licensee, as against any other, to be a participant in the distiller's California distribution system is a private business decision. Brand owners of products have the inherent right to select and limit the importer-distributors to whom they will sell their own products. *United States v. Colgate*, 250 U.S. 300, 307 (1919). The Designation Statute simply facilitates the exercise of this right.

The Statute's restriction upon nondesignated importers is imposed by the Legislature, not by the brand owner. That the application of this restriction is occasioned by the private *inaction* (nondesignation) of the brand owner does not transform his nonaction into a "licensing decision." The present case is analogous to *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U.S. 183 (1936), wherein this Court, reviewing the provision of an Illinois fair trade statute making prices set in a contract between two parties binding on third persons, found nothing that would "justify the contention that there is an unlawful delegation of power to private persons to control the disposition of the property of others. . . ." 299 U.S. at 194. *See also Scovill Manufacturing Co. v. Skaggs Pay Less Drug Stores*, 45 Cal. 2d 881, 888, 291 P.2d 936 (1955).

In addition to the fact that the Designation Statute does not delegate any licensing authority to distillers, Respondents' argument also fails under the principles discussed and applied in *Board of Regents v. Roth*, 408 U.S. 564 (1972). There, this Court held that Roth, a university assistant professor who had been hired for one year, was not entitled to a hearing when the university declined to rehire him for the next year. The Court reasoned that, the university's decision did not deprive Roth of any "liberty" or "property" interest protected by the Fourteenth Amendment. The Court recognized that Roth's right to "liberty"

would have been implicated, and a hearing required, if the university's refusal to rehire him had impugned his good name, reputation, honor or integrity, had imposed on him a stigma, or had foreclosed him from obtaining another job. However, the Court held that a person is not deprived of "liberty" when "he simply is not rehired in one job but remains as free as before to seek another." 408 U.S. at 575 (citation omitted). Turning to Roth's alleged deprivation of a "property interest," the Court held that "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.* at 577. The Court also held that "property interests" which are entitled to Fourteenth Amendment protection "are not created by the Constitution . . . [but] are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . ." *Ibid.* Since the university's rules made no provision for rehiring persons hired for one year, the Court found that Roth did not have a property interest sufficient to require a hearing.

Roth would be fully applicable to a situation in which a distiller declined to designate a particular California wholesaler to import the distiller's products. No property interest of the wholesaler would be infringed because the issuance of a California importer's license does not guarantee anyone's patronage to the licensee. Thus, the wholesaler would have, at most, an "abstract need or desire" to be designated. He clearly would not have a justifiable "unilateral expectation" of being designated. *A fortiori*, he would not have a "legitimate claim of entitlement" to be included within the distiller's distribution network. Nor would nondesignation deprive the wholesaler of a protected "liberty" because nondesignation would not damage his good name,

reputation, honor or integrity, impose on him any stigma, or foreclose him from obtaining a designation from other distillers.

E. THE DESIGNATION STATUTE DOES NOT DENY EQUAL PROTECTION OF THE LAWS.

Respondents contend that the Designation Statute denies undesignated wholesalers equal protection of the laws because it "discriminates between two groups of licensed distilled spirits importers," that are allegedly "functionally indistinguishable from a regulatory standpoint." (Respondents' Brief at 36.) Respondents also argue that the classification drawn by the Statute "bears no relationship to an actual and legitimate legislative purpose." (*Id.* at 37.) These contentions are without merit.

The Designation Statute is an economic regulation. It is settled that the appropriate standard under the Equal Protection Clause of the Fourteenth Amendment for reviewing such a statute is whether the statute bears a rational relationship to a conceivable legitimate state purpose. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981), and cases cited therein.

Rationality of Relationship. Because a principal purpose of the Designation Statute is to facilitate a distiller's business decision to effect a vertical allocation of the California wholesale market for his product, the Statute's differentiation between designated and nondesignated importers is not only rational—it is essential to achievement of this legislative objective.[9]

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[9]A party who challenges a legislative classification has a heavy burden in attempting to establish that the distinction is not rationally related to the statute's purpose. "States are not required to convince the courts of the correctness of their legislative judgments. Rather, 'those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.' " *Minnesota v. Clover Leaf Creamery Co., supra,* 449 U.S. at 464 (citations omitted). Respondents' burden has not been carried in this case.

Legitimacy of State Purpose. As we have previously shown (see discussion at 7, 9-10, *supra*), there is ample economic justification for the vertical allocation of wholesale markets. Moreover, this Court has consistently held, in dealing with the legitimacy of state purposes in economic equal protection cases, that it is inappropriate for the judiciary "to sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made . . . in the local economic sphere." *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). There is a presumption in favor of state economic legislation, applicable to both the legitimacy of the state's interest (*see Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Olsen v. Nebraska*, 313 U.S. 236 (1941)), and the rationality of the legislation as a means of achieving the state's objectives (*Minnesota v. Clover Leaf Creamery Co.*, *supra*, 449 U.S. at 464; *Vance v. Bradley*, 440 U.S. 93, 111 (1979)).

In addition, the case for upholding the Designation Statute "is undoubtedly strengthened" and the Statute enjoys an "added presumption in favor of . . . validity" by reason of the Twenty-first Amendment. *California v. La Rue*, 409 U.S. 109, 115, 118 (1972). *See also, Craig v. Boren*, 429 U.S. 190 (1976) (state economic regulations of alcoholic beverages "traditionally merit only the mildest review under the Fourteenth Amendment." 429 U.S. at 207 (citations omitted).

Conclusion.

For the reasons set forth above and in Petitioner's opening brief, it is respectfully submitted that the Judgment below should be reversed.

Respectfully submitted,

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